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IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

VERNICE C. NICHELSON,

Petitioner,

vs.

QUAKER OATS COMPANY,

Respondent.

RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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Question Presented

Respondent does not accept the Questions Presented by Petitioner. Respondent submits only one proper Question is presented to this Court:

> Whether, under the record evidence in this case, the United States Court of Appeals for the Sixth Circuit erred in holding the District Court's findings of discrimination to be clearly erroneous.

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Statement Of The Case

Petitioner Vernice C. Nichelson filed an individual charge of discrimination with the Equal Employment Opportunity Commission ("EEOC") on March 25, 1980 alleging that a one-week work assignment on January 11, 1980 and a two-day suspension for falsely reporting her time in February, 1980 were racially motivated. Her judicial complaint, filed on June 19, 1980, reiterated these two narrowly focused claims and

added a one sentence allegation generally averring denial of promotions and training.

The case was tried without a jury before United States District Court Judge Odell Horton.[1] The district court ruled that Nichelson could prevail by showing that race was a factor in the Company's action (36a-37a).[2] The trial testimony and documentary evidence established the context in which the race discrimination claim arose.

Nichelson has been employed by respondent Quaker Oats Company's Jackson, Tennessee plant. The plant manufactures frozen foods, such as waffles, pancake batter and pizza. Nichelson was hired in 1976 as a production worker and was promoted to the position of laboratory technician in the quality assurance department in 1977.

A. January, 1980 Work Reassignment

In January, 1980, the Company was conducting a special three week study of frozen waffle temperatures. During the week of January 14, 1980, Nichelson was assigned to work on this special project without a reduction in pay.

Nichelson claimed her work assignment was a punishment in retaliation for failing to complete her work the previous Friday, January 11, 1980. Her supervisor, Dale Smith, denied that the work assignment was disciplinary in nature. The District Court concluded that the one week work assignment was intended to be disciplinary. Nichelson further argued that this punishment was motivated by racial discrimination because

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[1] The Company argued to the Sixth Circuit that the District Court had prejudged the merits to the case because it made written findings against the Company at the close of Nichelson's case. The Sixth Circuit's decision did not reach this contention.

[2] The Company argued to the Sixth Circuit that the District Court erred by requiring Nichelson to prove only that race was a factor rather than a determining factor in the challenged employment action. The Sixth Circuit did not reach this assignment of error.

Deborah Hale, a white technician, was not similarly disciplined for failing that Friday or over the weekend to complete the work Nichelson had left. Hale testified that no one told her to complete Nichelson's work and that when she telephoned Smith on Saturday for instructions on what to do with Nichelson's unfinished work, Smith gave her permission to leave the work undone.

The District Court, stating "Nichelson is black, and Hale is white" (39a) concluded that the one week work assignment constituted disparate racial treatment (40a).

The Sixth Circuit agreed with the District Court that Nichelson's reassignment—without loss of pay—was a disciplinary measure (115a). However, since Hale had completed her own work and had been specifically excused from completing Nichelson's, the Sixth Circuit held that the District Court had failed to point to any evidence that would justify an inference of disparate treatment based on race.

B. February, 1980, Two Day Suspension

Nichelson was suspended without pay for two days in February, 1980 for falsifying her time card to collect extra Saturday overtime. Although Nichelson admitted that she had recorded eight hours for the Saturday in question when she had only worked six hours on that day, she told Company officials that she was merely following the example of supervisor David Johnson. Johnson, unlike Nichelson, is exempt for purposes of overtime (116a). Nevertheless, the Company investigated Nichelson's claim and Johnson denied overstating his time (116a).

Two white employees, Patsy Alexander Reed and Francis Morris, were similarly accused by management of overstating time. However, Reed and Morris, unlike Nichelson, denied the accusation and produced two supervisors, one black and the other white, who corroborated their denials (119a).

The District Court found that Nichelson overstated her time because she was following Johnson's example and that she was treated differently than Morris and Reed (59a, 61a). Also, it found that black employee Rosa Benson had testified that she, too, had been instructed by Smith to report eight hours on weekends regardless of the time she actually worked (57a). The District Court held that the Company's articulated reason for suspending Nichelson, falsification of time sheets, was a pretext for discrimination and nothing more (62a).

The Sixth Circuit, noting Johnson's exempt status and his unequivocal denial of overtime falsification to management, ruled that his different treatment was clearly non-racially based (116a). Because Reed and Morris had also denied any falsification and had even provided corroborating witnesses to management, the Sixth Circuit held that there was no basis to ascribe a racial motive for their disparate treatment (119a). As for Benson's puported testimony, the Sixth Circuit held the record contained no such testimony by her (118a). In fact, her testimony was directly contrary to the District Court's finding (118a-119a). Therefore, the Sixth Circuit reversed the District Court's finding that Nichelson was suspended for two days because she is black (119a).

C. Failure To Promote To Quality Assurance Supervisor

In October, 1980, six months after the lawsuit was filed, the quality assurance department was reorganized. One aspect of the reorganization involved the creation of two quality assurance supervisor positions. All quality assurance employees (six blacks and ten whites) were invited to apply for the positions and virtually all applied. In making the selections, the Company gave preference to employees who had prior experience as quality assurance monitors because the quality assurance supervisors were required to supervise monitors (120a). Two employees were selected, one black and the other white, both of whom had prior experience as quality assurance monitors

(120a). It is undisputed that Nichelson had no such experience (120a-121a). Yet the District Court held that the Company's refusal to promote Nichelson was racially motivated (81a). The Sixth Circuit reversed because the testimony clearly provided a nonpretextual reason why Nichelson did not receive the promotion (121a).[3]

D. Demotion to Quality Assurance Monitor

In October 1980, as part of its reorganization, the Company introduced a pasteurizer into the quality assurance department which reduced the amount of microbiological analysis performed by quality assurance technicians (121a). As a consequence, the Company was able to reduce the number of technicians from three to two. It was undisputed that the Company's policy in cases of a layoff or job reduction is to select the least senior person within the job classification (121a). Nichelson was the least senior laboratory technician and was consequently reassigned from laboratory technician to monitor with no loss of pay (121a-122a). She was restored to her old job as soon as the next technician vacancy became available (122a).

The District Court, noting only that the Company's job reduction policy was unwritten, held that Nichelson was demoted because of her race (86a). The Sixth Circuit reversed because the reassignment was based on seniority, a neutral, permissible, nonracial basis (122a).

E. Use Of A Racial Slur

Several years before, Dale Smith, the manager of the quality assurance department, made a racial slur to another employee in the department (122a). Nichelson, who was not

[3] The Sixth Circuit did not reach the Company's argument that this promotion, along with the demotion claim to be discussed *infra*, were outside the scope of the EEOC charge, outside the scope of the complaint, and time barred.

present when any racial slur was made, alleged the use of such a slur justified the findings of racial discrimination. The Sixth Circuit held that an unconnected racial comment remote in time and circumstance does not convert the case into one of racial discrimination in employment.

Reasons For Denying The Writ

The Sixth Circuit's opinion does not present the same problem of appellate review of trial court credibility determinations presented in *Anderson v. Bessemer City,* ____ U.S. ____, 105 S.Ct. 1504 (1985). *Anderson* preserved the "clearly erroneous" standard. As the Court reaffirmed,

> "[a] finding is 'clearly erroneous' when although there is evidence to support it, the reviewing court on the entire evidence is left with a definite and firm conviction that a mistake has been committed."

105 S. Ct. at 1511, *quoting United States v. United States Gypsum Corp.,* 333 U.S. 364, 394-395 (1948).

The decision of the Sixth Circuit herein is carefully written and fully consistent with the "clearly erroneous" standard. It is not contrary to the Supreme Court's decision in *Anderson.*

The Fourth Circuit in *Anderson* applied a more stringent appellate review of the findings of the district court than was customary because of the district court's adoption of complainant's proposed findings of fact and conclusions of law. 105 S. Ct. at 1510-11. The Supreme Court criticized this approach which resulted in errors committed by the Fourth Circuit. One such error was what amounted to a *de novo* weighing of the evidence regarding the qualification of individuals seeking a contested promotion by the Fourth Circuit. A second error was the Fourth Circuit's rejection of the district court's finding that the complainant, alone, was asked questions regarding her

spouse's feelings about her application for the position. The Fourth Circuit's decision improperly characterized as serious a comment of one witness which the district court had dismissed as facetious.

The Sixth Circuit engaged neither in a *de novo* review of evidence nor in a reinterpretation of the demeanor of witnesses. For example, it accepted the District Court's finding that the one week work assignment in January, 1980 was disciplinary (115a). The Sixth Circuit reversed the District Court because the record did not establish that similarly situated white employees were not punished for such workplace mistakes (115a-116a).

The District Court's findings on the October, 1980 denial of promotion and reassignment to quality assurance monitor were not based on credibility resolution but rather on what the District Court termed "the totality of the facts and the circumstances of this case" (81a, 86a). The Sixth Circuit reversed because the evidence in the record established legitimate nondiscriminatory reasons for the Company's actions. It was undisputed that Nichelson lacked the experience for the promotion in question and that the two candidates selected, one black and the other white, had such experience (120a). As for the reassignment to monitor, it was undisputed that the staff reduction was appropriate and that Nichelson's seniority in the job made her the appropriate employee for reassignment (121a-122a).

In reversing the District Court's liability determination on the two day suspension, the Sixth Circuit did not, as alleged by Petitioner, re-evaluate whether Nichelson or Johnson was the more credible witness (Petition at 10-11)[4] Instead, the Sixth

[4] Petitioner incorrectly referes to Johnson as a "defense witness" (Petition at 10-11). Johnson was called to testify by Nichelson's attorney during Nichelson's case-in-chief. Johnson was never a "defense witness."

Circuit held that Johnson was not similarly situated with Nichelson because he was exempt for purposes of overtime (116a). Furthermore, Johnson, like Reed and Morris, denied overstating his time when investigated by management (116s, 119a). It is undisputed that Nichelson admitted overstating her time to management. Consequently, the record did not support the District Court's finding that the suspension of Nichelson, rather than Johnson, Reed, or Morris, was racially motivated.

In only one instance did the Sixth Circuit discredit the testimony of a witness relied upon by the District Court. That witness, Rosa Benson, did not present a coherent, consistent or facially plausible story (117a-118a). The Sixth Circuit's treatment of Benson's testimony is wholly consistent with *Anderson*:

> This is not to suggest that the trial judge may insulate his findings from review by denominating them credibility determinations, for factors other than demeanor and inflection go into the decision whether or not to believe a witness. Documents or objective evidence may contradict the witness' story; or the story itself may be so internally inconsistent or implausible on its face that a reasonable factfinder would not credit it. Where such factors are present, the court of appeals may well find clear error even in a finding purportedly based on a credibility finding.

105 S. Ct. 1512-13.

Clearly, *Anderson* does not constitute a mandate for the courts of appeal to rubber-stamp decisions of the district court. 105 S. Ct. at 1515 (Powell, concurring). The vice of *Anderson* is appellate court rejection of the factfinder's choice between two permissible views of the evidence. The Sixth Circuit in this case did not engage in such an exercise.

This case is distinguishable from *Anderson* on its facts. Granting the Petition under the circumstances of this case will chill the willingness of the courts of appeal to engage in a comprehensive review of the district court record. Such a comprehensive review is essential to the integrity of the appellate process.

Conclusion

Petitioner has not met any of the standards governing review on writ of certiorari. In particular, petitioner has not established that there is "an important question of federal law"[5] which is in conflict with this Court's decision in *Anderson*. Respondent submits that the petition for writ of certiorari to the United States Court of Appeals for the Sixth Circuit should be denied.

Respectfully submitted,

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[5] Rule 19 of the Rules of the Supreme Court of the United States.